STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ALPINE PRODUCE,	)	Case Nos. 79-CE-342-SAL
	)	79-CE-342-1-SAL
Respondent,	)	79-CE-342-2-SAL
	)	79-CE-353-SAL
and	)	79-CE-364-SAL
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	9 ALRB No. 12
Charging Party.	)	
	)	

DECISION AND ORDER

On December 1, 1980, Administrative Law Judge (ALJ)[1/] Ron Greenberg issued the attached Decision in this proceeding. Thereafter, Respondent Alpine Produce, and the General Counsel, each filed exceptions and a supporting brief.

Pursuant to the provisions of Labor Code section 1146,[2/] the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached ALJ Decision in light of the exceptions and briefs of the parties, and has decided to affirm the rulings, findings, and conclusions of the ALJ as modified herein, and to adopt his recommended Order with modifications.

The record supports the ALJ's conclusion that

[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20925, amended eff. Jan. 30, 1983.)

[2/] All section references herein are to the California Labor Code unless otherwise specified.

Respondent's announcement of a wage increase in the midst of a union organizational campaign was coercive and tended to interfere with the employees' right to organize and therefore was a violation of section 1153(a).

Following the announcement of the wage increase, beginning on or about August 31, 1979, members of the cauliflower and broccoli crews went on strike. They presented demands to the Respondent regarding certain terms and conditions of their employment.[3/]

The Respondent's reactions to the protected concerted activity of the members of the cauliflower and broccoli crews were not manifested until the week following their return to work after the strike. On September 11, Respondent terminated the whole cauliflower crew, including those who engaged in the earlier strike activities, those who were hired as replacements during the strike and were still working on September 11, and one crew member who had struck but was not present at the time of discharge. The record supports the ALJ's conclusion that those discharges were in violation of section 1153(a) and (c).

We note that Respondent did not specify the deficiencies

[3/] The ALJ concluded that Respondent's failure to reinstate the strikers on September 4 was violative of the Agricultural Labor Relations Act (Act), but did not provide any remedy for that violation. We reverse that conclusion, as there is insufficient evidence to support it. While there is some evidence that the striking employees made clear to Respondent that their work stoppage was to be for a limited period of time, the exact understanding of the Respondent as to the expected return date of the strikers is not material, as the record reveals that by September 5 or September 6 all strikers who had requested reinstatement were reinstated.

in work performance which it claims justified the discharge of the whole crew on September 11.[4/] At one point Respondent claimed the discharge of the whole crew was justified by its working too slow, its interference with production efficiency, and its deliberate destruction of the product by cutting through cauliflower heads that should have been picked, which, Respondent claimed, occurred on the date of termination, September 11. Respondent also contended that the whole crew (including its missing member) was discharged for insubordination; that is, when a supervisor directed the crew to work at a faster rate, one employee, speaking in English, stated that the crew would not comply. At that point, and apparently before Respondent determined whether that one response represented the will of the crew, the decision was made to terminate the entire crew, including the dissenting employee and the crew member who was absent on that day.

Except for the testimony concerning the dissenting employee's response, none of the testimony from Respondent's witnesses describes any improper acts, either by individual crew members or groups of crew members, that would support Respondent's claim that it was justified in discharging the entire crew. Rather, Respondent's witnesses' testimony consists of subjective perceptions concerning the slow speed at which the crew was cutting

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[4/] Inadequate work performance would not necessarily justify the discharge of a crew member who was not present at the time of the claimed deficiencies, but one employee, absent at that time, was among those terminated. That employee, Jose Mondragan, had previously engaged in protected concerted activity, i.e., engaging in the strike after the wage increase was announced on or about August 31.

cauliflower and claims that the cutting was improperly or carelessly executed. The termination of the whole crew, including the absent member, seen in light of the recent organizational campaign, the participation of most of the crew members in a recent strike, and the unpersuasive justifications proffered by Respondent support the ALJ's finding that Respondent would not have discharged the members of the cauliflower crew absent their protected concerted activity. We therefore conclude that the discharge of that crew was in violation of section 1153(c) and (a) of the Act. (Wright Line (1980) 251 NLRB 150 [105 LRRM 1169].)

As the entire cauliflower crew was illegally discharged, the ALJ erred in recommending that the reinstatement and backpay remedy be limited to the crew members who had participated in the earlier strike. Correcting that error, our remedial Order will apply to all members of the cauliflower crew, regardless of whether they were named in the complaint or in the ALJ's Decision, as the entire crew was discriminatorily terminated on September 11 because some of them had engaged in the strike.

Two days later, on September 13, Respondent discharged all members of its broccoli crew, which was comprised of employees who had engaged in the same strike, which had ended eight days previously.

Respondent contends that the discharges were justified because only employees who had previously received three warnings were terminated. The broccoli crew had received two group warnings within the three and one-half weeks preceding September 13, and Respondent discharged the crew on September 13 after giving them

a third group warning for refusing to begin harvesting work on another field of broccoli at the end of the day.

The two prior group warnings were premised on: (1) the failure of an employee who threw a beer can at a supervisor to admit his guilt, and the failure of the crew itself or a member thereof to identify the wrongdoer; and, (2) the fact that the crew members went on strike on August 31 and did not perform their regular work duties until they returned on September 5 or 6.

Respondent, by its own account, admits that the broccoli crew would not have been terminated but for the concerted action of the crew in striking, which occasioned the second warning. That admission clearly indicates an interference with the employees' right to engage in protected concerted activity. The group warning which issued on September 13 would have been only the crew's second group warning and not a basis for discharge, under Respondent's procedures, but for the previous group warning issued for engaging in concerted activities.

An additional reason in support of the ALJ's conclusion that Respondent's termination of the broccoli crew violated the Act is found in the testimony of Respondent's supervisors which revealed differing applications of the Respondent's asserted policy that the third warning necessarily leads to termination. It is clear that the supervisors were aware of such a policy but it is also clear that they used their own judgment in weighing the seriousness of the previous two warnings before deciding whether termination was the appropriate response to an infraction giving rise to the third warning. There is no record evidence that the

third group warning received by the broccoli crew was even weighed in light of the relative seriousness of the previous offenses. Rather, all of the crew members were summarily terminated after they had refused to begin harvesting work on a new field at the end of the workday. Without delving into the merits or propriety of issuing a warning under the circumstances revealed in the record for that date, we find that the entire crew was terminated because of their protected concerted activity, i.e., the strike, and that Respondent's reliance on the warning system to justify the termination of the entire crew is pretextual. Accordingly, affirming the ALJ, we conclude that Respondent violated section 1153(c) and (a) by its discharge of the broccoli crew.

ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Alpine Produce, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment because he or she has engaged in union activity or any other concerted activity protected by section 1152 of the Act.

(b) Surveillance of agricultural employees' union activities or any other protected concerted activity of agricultural employees.

(c) Preventing, limiting, or restraining any union organizers or agents from taking access to Respondent's premises

pursuant to section 20900 et seq. of the Board's regulations.

(d) Granting or promising agricultural employees a wage increase or any other employment benefit in order to discourage them from joining or supporting the United Farm Workers of America, AFL-CIO, (UFW) or any other labor organization.

(e) In any like or related manner, interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions, which are deemed necessary to effectuate the policies of the Act:

(a) Offer to all members of its cauliflower crew, who were discharged on or about September 11, 1979, and all members of its broccoli crew, who were discharged on or about September 13, 1979, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other employment rights or privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of Respondent's unlawful discharge of them, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(b) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, and all other records relevant and necessary to a determination, by the Regional Director, of the amounts of backpay and interest due under the terms of this Order.

(c) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from August 31, 1979, until the date on which the said Notice is mailed.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(g) Notify the Regional Director in writing, within

30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: March 18, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Alpine Produce, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging our Cauliflower Crew and Broccoli Crew No. 1 in September 1979 because of their union activity and other protected concerted activity, by raising our employees' wages on August 31, 1979, in order to disourage our employees from joining or supporting the United Farm Workers of America, AFL-CIO, (UFW) by surveilling our employees while they were engaged in protected concerted activity, and by denying UFW organizers access to our property to talk to our workers during their break periods.

We also want to tell you that the Agricultural Labor Relations Act (Act) is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT discharge, fail or refuse to rehire, or otherwise discriminate against any employee because he or she has exercised any of the above rights.

WE WILL offer the members of the Cauliflower Crew and Broccoli Crew No. 1 their old jobs with seniority, and we will pay them any money they lost because we discharged them unlawfully, plus interest on such amounts.

WE WILL NOT increase your wages in order to discourage you from joining or supporting the UFW or any other labor organization.

WE WILL NOT engage in surveillance of employees who are engaged in union activities or other protected concerted activities.

WE WILL NOT prevent any union agents or organizers from taking access to our property, pursuant to the Board's regulations, in order to speak with our workers.

Dated: ALPINE PRODUCE

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3160. This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California,

CASE SUMMARY

9 ALRB No. 12

Alpine Produce

Case Nos. 79-CE-342-SAL
79-CE-342-1-SAL
79-CE-342-2-SAL
79-CE-353-SAL
79-CE-364-SAL

ALJ DECISION

The ALJ found that Respondent had engaged in various unfair labor practices:

1. Interference with employees' organizational rights by announcing an unscheduled wage increase after an organizational campaign was under way at Respondent's operation where Respondent was aware of that fact.

2. Failure to rehire striking workers immediately following the end of a 48-hour period, which period the ALJ determined had been noticed to Respondent.

3. Denial of union access to workers, which access was sought in compliance with Board rules.

4. Coercive surveillance of employees, i.e., use of motion picture camera to take pictures of employees engaged in concerted activity.

5. Unlawful discharge of employees in cauliflower crew who had previously engaged in strike action during an organizational campaign and in circumstances indicating union animus and discriminatory work assignment.

6. Unlawful discharge of broccoli crew two days after discharge of cauliflower crew and on basis of three written warnings, one of which resulted from the crew having engaged in protected concerted activity.

BOARD DECISION

Reviewing Respondent's claim that work deficiencies were the basis for the discharge of the cauliflower crew, the Board concluded that the termination of the whole crew, including an absent member, seen in light of the recent organizational campaign, the participation of most of the crew members in a recent strike, and the unpersuasive justifications offered by Respondent, support the ALJ's finding that Respondent would not have discharged the members of the cauliflower crew absent their protected concerted activity. The Board affirmed the ALJ's conclusion that Respondent violated section 1153(c) and (a) by its discharge of the cauliflower crew.

Concerning the discharge of the broccoli crew, the Board noted first Respondent's admission that, but for the warning which was based on the protected concerted strike activity of the crew, the crew would

not have been terminated, and second, the pretextual nature of Respondent's reliance on the warning system to justify the termination of the entire crew. The Board affirmed the ALJ's conclusion that Respondent violated section 1153(c) and (a) of the Act by its discharge of the broccoli crew.

The Board reversed the ALJ's conclusion that Respondent's failure to reinstate the strikers on September 4 was violative of the Act, as there was insufficient evidence to support the ALJ's conclusion.

The Board affirmed the ALJ's findings and conclusions that Respondent engaged in unlawful interference with employees' organizational rights, by photographic surveillance, granting wage increase to discourage union activity, and denial of access.

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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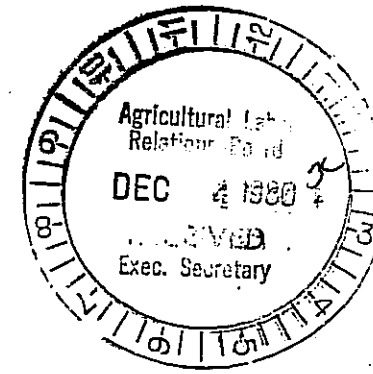

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

ALPINE PRODUCE, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	Case Nos. 79-CE-342-SAL 79-CE-342-1-SAL 79-CE-342-2-SAL 79-CE-353-SAL 79-CE-364-SAL

APPEARANCES:

James W. Sullivan, of Salinas, California, for the General Counsel

Terrance R. O'Connor, Grower-Shipper Vegetable Association of Central California, Salinas, California, for the Respondent

DECISION

STATEMENT OF THE CASE

RON GREENBERG, Administrative Law Officer: This case was heard before me in Salinas, California, on March 13, 14, 17, 18, 19, 20, and May 30, 1980. On December 4, 1979[1/] a complaint issued based on five charges filed against Respondent, alleging violations of Sections 1153(a) and (c)[2/] of the Agricultural Labor Relations Act (hereafter the "Act"). By answer filed December 10, Respondent

1/ Unless otherwise stated, all dates refer to 1979.

2/ All statutory references herein are to the California Labor Code unless otherwise specified.

denied committing any violations of the Act. On March 27, 1980, General Counsel filed its First Amended Complaint pursuant to Section 20222 of the Board Regulations.[3/]

All parties were given full opportunity to participate in the hearing. The General Counsel and the Respondent filed post-hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Alpine Produce is a partnership engaged in agriculture in Monterey County, California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The UFW is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours of employment and conditions of work for agricultural employees. The UFW is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Employer's Operations

Alpine Produce is a partnership owned by the Blomquist family. Larry Blomquist is the managing partner. During the relevant time period of this case, August-September, Alpine worked three

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3/ All references to the Board's regulations are to Title 8, California Administrative Code.

locations in the Salinas area--Martin Ranch, Garlinger Ranch, and La Mission Ranch in Soledad. At that time, the company grew cauliflower, broccoli, and lettuce.

The supervisory structure of Alpine Produce has owner Larry Blomquist overseeing the entire operation. Rick Rubbo,[4/] harvesting supervisor of the broccoli crews, has basic responsibility for broccoli harvesting. Mike Silva is supervisor of broccoli crew #1, and Javier Jaramillo is the foreman of that crew. The cauliflower crew is supervised by Mark Crossgrove,[5/] often called Marcos by the employees, and the crew's foreman is Ruben Gomez. The lettuce crew working La Mission Ranch is supervised by Gary McKinsey and Dan Blomquist, Larry's brother.

III. The Wage Increase; Company Policy Regarding Wage Increases

On August 31, a general wage increase for all employees was announced by the company. Larry Blomquist announced the increase to an assembled group of cauliflower crew workers, speaking through his foreman, Ruben Gomez. According to the testimony of crew supervisor Mark Crossgrove, the crew responded that the rates were O.K., but they wanted a union and didn't want to go back to work without a representative. After this meeting, Blomquist testified that the crew walked away from the work site, calling

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4/ The parties stipulated that Rick Rubbo often is referred to as "Ray" by the employees.

5/ Although Respondent denied supervisory status for Jaramillo and Crossgrove in its Answer, I find that both men served as supervisors as defined by Section 1140.4(j) of the Act. The record is replete with evidence that both Jaramillo's and Crossgrove's work required exercising independent judgment. Anderson Farms Co., 3 ALRB No. 67 (1977); Mid-State Horticulture Co., 4 ALRB No. 101 (1978).

to the lettuce crew in the field for them to join the workers in a work stoppage.

On that same day, Rick Rubbo testified that he was directed to tell the cauliflower crew at the Martin Ranch of the wage increase. At 8:00 a.m. he informed the crew. The cauliflower crew then walked off, except for one worker. Rubbo then went to talk to broccoli crew #1 at 9:15 a.m. He testified that half the employees were happy about the new rate and the other half stated that they were going to walk off. According to Rubbo's testimony, half the crew returned to work.

Larry Blomquist testified that it is the policy of Alpine Produce to "stay with the standards of industry." He said that decisions to raise wages are made according to information received from the Growers-Shippers Association or from other growers. Wages generally are raised at Alpine once a year on July 1. Blomquist testified that in 1979 there were two increases, one in March and one in late August. Blomquist stated that Growers-Shippers had indicated that some other companies were raising their wages in August, 1979. Blomquist further testified that the relevant comparison of wages is done on an industry-wide basis, not by particular crop. He testified that Associated, Mann, Veg-Pak, Bailly, and D'Arrigo were his chief competitors. He stated that he did not know how many times those companies raised wages in 1979.

IV. Respondent Knowledge of Union Activity

During the week prior to the August 31 wage increase announcement, Jose Mondragon, a cauliflower cutter, testified

that his foreman Ruben Gomez and supervisor Marcos were nearby when he received union authorization cards from a tractor driver and his brother-in-law. Mondragon stated that Marcos was inside a pickup truck at the time, some four feet from the workers. Ruben was standing next to the truck in view of the worker receiving the card. Mondragon further testified that he gave Ruben's son a card while Ruben and his son were having lunch together.

Rick Rubbo testified that when Ruben Gomez announced the wage increase to the workers, some of them said that they wanted to go to the Union. Rubbo testified that he assumed they were referring to the UFW. He stated that his belief was not based on anything that had occurred with the Alpine crews, but rather based on "stuff going around the Valley." Rubbo further testified that he maybe had seen a UFW button "here and there" in the crews prior to August 31.

Larry Blomquist testified that when he talked to the cauliflower crew about the raise on August 31, he heard nothing mentioned about the union. He did not recall seeing any union buttons or insignia during the gathering. However he stated that he believed that he saw union insignia on August 31 at the Garlinger Ranch, saying that "they're always around..." He also testified that there were some flags in the area, which he guessed were UFW flags. Blomquist further testified that he was "dumbfounded" when the crew walked off, there having been no discussion about a walk off. Blomquist further stated that an employee handed him a Petition for Certification (GC Exh. 2(a)) on August 31 when he got on the bus to announce the wage increase

to the cauliflower workers.

Javier Jaramillo, foreman of broccoli crew #1, testified that UFW organizers came onto his bus to talk to workers on two occasions a week prior to the initial work stoppage on August 31. Jaramillo stated that he believed that the organizers and workers talked about having an election.

Mark Crossgrove, cauliflower supervisor, testified that he was not aware of authorization cards being distributed among the crew prior to August 31. He further stated that between the work stoppages of August 31 and September 11, he saw no union insignia worn by any crew member.

V. August 31 Work Stoppage

On August 30, Heriberto Mendoza, a member of the cauliflower crew, testified that the workers met and planned the stoppage for the next day. According to Mendoza's testimony, foreman Gomez was 15 meters away from the workers at the time.

On the morning of August 31, the cauliflower and broccoli crews walked out of the fields. Cauliflower cutter Jose Mondragon testified that his crew stopped work on August 31 for a 48-hour period to demonstrate that they wanted better work hours.

Heriberto Mendoza testified that on Monday, September 3 (Labor Day and a work holiday), he spoke to Ruben Gomez, telling him that "we would all be ready--waiting for him to pick us up to go to work" the next day. According to Mendoza, Gomez said that they all had been fired. Mendoza testified that he and the crew workers waited for the bus the following days, September 4 and 5, but the bus never came.

Porfirio Balcazar, a tractor driver for the cauliflower crew, stated that he tried to come back to work after the work stoppage. He testified that he went to the pickup point, but the bus never arrived. He also stated that after the work stoppage, but prior to September 4, he telephoned Ruben Gomez, telling him that he wanted to return to work.

Ricardo Morales, broccoli crew #1, testified that he talked to foreman Jaramillo, informing him that the crew was going to stop for 48 hours. He then told supervisor Rubbo that the crew would not be back until Tuesday, September 4, because Monday was a holiday. According to Morales testimony, Rubbo said that "if you stop, you won't have a job anymore." Morales testified that he waited for the bus on September 4. A bus driven by foreman Juan Munoz came by the designated pickup point. Rick Rubbo followed the bus in his car. According to Morales, Rubbo told the workers in broccoli crew #1 that another bus would pick them up in 5-10 minutes. The workers waited, but no bus arrived. Rubbo denied this conversation. According to Morales, the workers again waited for the bus on September 5 with the same results. The bus finally picked up the workers on September 6. Morales testified that foreman Jaramillo told him at that time that the company had given him his job back.

Saul Rodriguez, a cutter in broccoli crew #1, who participated in the August 31 work stoppage, testified that he intended to return to work on September 4, but the bus never arrived. Rick Rubbo testified that none of the people who walked out on August 31 came to work on September 4. He further testified that all of

the workers except for one applied for reinstatement on Wednesday, September 5. Rubbo stated that they were all rehired. The replacements used over the week-end went back to broccoli crew #2.

Mark Crossgrove testified that when the crew walked off on August 31, it was his understanding that the crew had quit. Crossgrove stated that a new cauliflower crew was hired by Ruben Gomez, and that the replacements were permanent. He also testified that some people returned to work on September 5, while others returned on September 6. All the workers were given back their jobs.

Larry Blomquist testified that it is a company policy to pay workers within 24 hours of their being fired. He stated that the status of the workers who walked off on August 31 was "presumed quit."

VI. Alleged Denial of Access[6/]

Ricardo Morales testified that he, Raul Valle, and Saul Rodriguez, and other workers went to the Mission Ranch on September 1 to talk to lettuce workers at that location. Morales and the others formed a picket line. According to Morales, when the workers broke for lunch, Valle asked a company representative if he could talk to the workers, wanting them to join the others in the work stoppage. The company representative (either Dan Blomquist or Gary McKinsey) refused the request.[7/]

6/ General Counsel moved to dismiss paragraph 10(b) of the Complaint, alleging an access denial on September 4. I granted the motion, deleting that allegation from the Complaint.

7/ Morales also testified that he went that same day to the ALRB office for a scheduled pre-election conference. Morales testified that no company representative was present.

UFW organizer Valle testified that when he arrived at the Mission Ranch on the morning of September 1, a company representative approached him as he got out of his car, informing Valle that he was on private property. Valle stated that when he saw the workers taking a break, he asked Dan Blomquist if he could speak to the workers, showing him his access card. The request was denied. Valle said that approximately 15-16 workers were present on the picket line that morning.

Saul Rodriguez testified that as many as 35 strikers were present. He testified that when Dan Blomquist denied their request to talk to the lettuce workers while they were eating, Blomquist held a hoe horizontally in front of him with both hands.

Larry Blomquist testified that he was at La Mission Ranch on September 1 when Valle and Morales asked to speak to the workers. Blomquist testified that 20-25 pickets were present, and the entire lettuce crew did not exceed 20-24. Blomquist stated that when the pickets asked to take access, they said "We want to talk to the crew." He interpreted the "we" to mean "the whole bunch of them." On that basis, he refused them access.

Supervisor McKinsey stated that on September 1, a white Ford LTD with four people arrived at the lettuce field, the occupants telling him that they wanted to talk to the crew. He testified that he told them that the crew was working, denying them access. McKinsey stated that the crew did not take any breaks that Saturday. McKinsey testified that the pickets returned at 10:45 a.m., again expressing a desire to talk to the workers. According to McKinsey, some of the pickets were carrying rocks and sticks

and flags. Respondent showed a video tape (Resp. Exh. 18) at the hearing to demonstrate the violence of the UFW pickets that day.

Hortencia Rojas, a SunHarvest worker, testified that she went to La Mission Ranch on September 1 and spoke to Mr. McKinsey, interpreting for Valle and a man named Luis. She told McKinsey that they wanted to talk to the workers in the field. Rojas testified that McKinsey said they could not go into the field. She further stated that no one asked the people for identification.

VII. Alleged Surveillance by Respondent

Raul Valle testified that on September 1 at La Mission Ranch, Dan Blomquist used a moving picture camera to record the pickets' movements. Saul Rodriguez also testified that he saw a man with a movie camera which was aimed at the workers standing nearby.

Larry Blomquist testified that his brother was taking pictures with a movie camera on September 1, because people were rushing the fields with sticks and other things.

Larry Blomquist further testified that he arrived at the Garlinger Ranch on September 1, observing strikers driving their cars through the loading zone. He stopped them, telling them they were on private property. According to Blomquist, the strikers ignored him, walking to the edge of the field where the crew was working. The strikers yelled at the crew. Blomquist testified that he then called Rick Rubbo and told him to call the sheriff. Rubbo testified that he called the sheriff because of the 25-30 pickets. Sheriff's deputies escorted the group away at about 7:30 a.m., a half hour after the call.

Blomquist also instructed Mike Silva to take the license plate numbers of the strikers' cars.

Larry Blomquist testified that the movie camera was used on September 1 to document acts of violence by the strikers.

VIII. Discharge of the Cauliflower Crew on September 11

On September 11, members of the cauliflower crew were discharged. According to employee Mendoza's testimony, Ruben Gomez talked to his crew on September 10, instructing them how to pick cauliflower. He told them that the cauliflower was too ripe; and the yellow ones and big heads should be chopped, throwing the good ones into the bin. Mendoza testified that the cauliflower field on September 11 had lots of yellowish and wilted cauliflower. He also stated that the tractor was going too fast, making it difficult to distinguish the good from the bad. He testified that the tractor was going faster than normal.

Jose Mondragon testified that there were three tractors working with the crew that day, and one tractor was going slower than the others. He testified that the fast tractors were with the workers who engaged in the work stoppage.

Tractor driver Porfirio Balcazar testified that the condition of the cauliflower in the last field worked on September 11 was very bad. He testified that he was instructed to drive faster than usual while workers complained about the speed. He further stated that the tractor with the new people was going slower. Supervisor Crossgrove corroborated Balcazar's testimony, stating that he had instructed him to drive faster.

On September 11, according to employee Mendoza, Larry Blomquist spoke to the crew through Ruben Gomez, telling them that they were doing a bad job and that the company was going to fire them. Mendoza testified that he told Blomquist that if they wanted a good job, they should have the tractor go slower. Mendoza stated that Ruben then said, "you're all fired." Mendoza testified that he had two prior written reprimands at that time.

Balcazar testified that he found out they had been fired from the workers leaving the field. On the way home on the bus, Ruben's son-in-law told him that he could come back to work the next day. When the bus failed to pick him up, he telephoned Ruben, who told him they didn't want any of the old workers there any more. Balcazar testified that he understood that to mean the workers who had gone out on the work stoppage.

Mark Crossgrove filled out personnel action forms for the entire crew on September 11. He testified that he gave them to the employees when they received their checks on the following Friday. Crossgrove testified that he supervised the cauliflower crew on September 11 at the Martin Ranch, cutting alongside the crew. He testified that their performance was fine on the first two fields. On the third, he said the performance was poor. The workers were going too slowly and were destroying good heads of cauliflower by chopping through their center. He testified that they held a meeting in the field because of this problem, attended by Greg Crossgrove, Ruben Gomez, himself, and the crew. Ruben interpreted for Crossgrove. According to Crossgrove, a woman in the crew spoke to him in English, saying that the crew wasn't going to go any faster, they were not going to do a

better job, and they would not quit. Crossgrove testified that he responded by firing the entire crew for destroying the grower's property.

IX. Discharge of the Broccoli Crew on September 13

On September 10, Larry Blomquist conducted a meeting with broccoli crew #1. Ricardo Morales testified that the workers told Blomquist that they only wanted to work eight hours with no overtime and four hours on Saturday. Morales testified that Blomquist agreed. However he did not agree to pay time and a half for overtime. Morales testified his understanding was that the crew could work only eight hours if they so desired.

On September 13, according to Morales' testimony, none of the crew members worked the last field because it was too wet and they had already worked eight hours. On Saturday, September 15, Morales went to the Alpine office to pick up his check. Mike Silva gave him his check along with two "tickets", telling Morales that he no longer had a job. On Sunday, September 16, according to Morales, he telephoned foreman Jaramillo, who told him that the bus would pick up the workers on Monday. When Morales boarded the bus on Monday morning and told Javier that Mike had let him go, Jaramillo told him to get off the bus. Morales further testified that those members of the crew that had not been involved in the work stoppage were allowed on the bus.

Saul Rodriguez testified that he worked until 3:00 p.m. on Thursday, September 13, when he stopped work. On Friday he did not wait for the bus because Javier had told him there was no broccoli to cut on Friday. On Saturday, he went to the office in

Gonzales to pick up his check, where he also received a slip telling him he was fired. He testified that Mike Silva told him he was being fired because of his lack of good feelings toward the company. Rodriguez testified that he had never refused to do work in the past. He further stated that Mike said that during the work stoppage, Rodriguez was shouting, "Let's stop work," while waving a flag.

Rick Rubbo testified that on September 13, crew #1 was asked at 2:30 or 3:00 p.m. whether they wanted to cut a third field. They agreed, and Rubbo proceeded to set up the field at the Smith Ranch. Rubbo testified that the field was sort of wet, but he believed that it could have been cut efficiently. Rubbo testified that the crew refused to cut the third field after he had set up the machinery. Rubbo instructed Mike Silva to write up the entire crew and suspend them. Rubbo stated that some of these employees later were fired because they had three written warnings.

Mike Silva testified that he made out personnel action forms for all the broccoli crew members on September 13. At the office later that evening, Silva testified that he wrote out other tickets, firing some of the employees who had more than three warnings. Silva further testified that on August 22, the entire broccoli #1 crew was written up because an unidentified member of the crew had thrown a can at the bus driver. He also stated that he wrote up the entire crew for the August 31 walk out. He originally had written them up as "quit," but he changed that to a warning. These warnings were given to the employees on Friday of that same week with their checks.

X. Denial of Rain Gear

Rick Rubbo testified that he instructed members of the broccoli crew who refused to work on August 31 to leave their rain gear in the bus. According to Rubbo, when the broccoli crew returned to work, half of the returning people (six) did not have rain gear. The gear had been reused by other workers. Rubbo instructed Mike Silva to get additional rain gear on September 5. Rubbo informed the crew that the rain gear would be issued within one and a half hours, and if they wanted to begin cutting they could do so. He also gave them the option to wait for the gear. Rubbo testified that the crew agreed to cut. Rubbo testified that when the gear arrived later that morning, there was enough for everyone.

Mike Silva testified that he went to Acme Sales at 8:00 a.m. on September 5 to purchase the rain gear. He stated that he took it to the field where crew #2 was working (Violini), and then he went to the Turri Ranch sometime after 9:00 and distributed the gear to crew #1. Silva testified that he did not hear any complaints about gear after the distribution. Rick White, general manager of Acme Sales, testified that a representative of Alpine purchased 10 pairs of rain pants and 13 pairs of boots on September 5.

Ricardo Morales testified that he worked without rain gear on September 5 and 6. According to Morales, even though Mike Silva brought some equipment on September 6, four workers remained without equipment. Morales testified that he found a pair of pants on September 7 and some used boots on September 10. Saul Rodriguez testified that he did not receive his full complement of

equipment until September 7.

XI. Company Policy Regarding Firings, Warnings

Rick Rubbo testified that the company has a policy of automatically firing an employee after receiving three warnings. He later testified that the company will evaluate the seriousness of the warnings before firing a worker.

Mike Silva testified that he initially gives a worker a verbal warning before writing him up. The written warnings (personnel action forms) are used for warnings, pay rate changes, quits, and firings. He further testified that certain offenses result in a verbal warning, such as failure to show up for work, while other offenses warrant immediate write-ups, such as coming to work under the influence of alcohol. He testified that it is a company policy to fire a worker after he has received three warnings, and that this policy invariably is followed.

Mark Crossgrove testified that he would exercise his discretion in deciding whether or not to fire an employee. He testified that it was not automatic that a worker would be fired after the third warning. He testified that he would consider the gravity of the offense in deciding whether to fire an employee. He listed as serious offenses the August 31 work stoppage and the cutting through cauliflower heads on September 11.

ANALYSIS AND CONCLUSIONS

Section 1153(a) of the Act makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce employees in the exercise of their right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and . . . the right to refrain from any or all such activities." Section 1153(c) makes it an unfair labor practice to discriminate "in regard to hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Further, Section 1148 directs the Board to follow applicable precedents of the National Labor Relations Act, as amended in 29 U.S.C. Section 151, et. seq. (hereafter the "NLRA").

I. The August 31 Wage Increase

At the time the increase was announced by Larry Blomquist, an employee handed him a Petition for Certification. An organizational campaign had begun prior to the announcement. During the preceeding week, employee Mondragon testified that foreman Gomez and supervisor Crossgrove were very close to employees receiving union authorization cards. Mondragon further testified that he gave Ruben's son a card while Ruben and his son were having lunch together.

Rick Rubbo testified that he assumed the workers were talking about the UFW when they said they wanted to go to the Union on August 31. He said it was based on "stuff going around the Valley." Rubbo further testified that he maybe had seen a UFW button "here and there" in the crews prior to August 31.

Although Blomquist said that he was "dumbfounded" when the crew walked out, he had seen some UFW flags in the area prior to that day.

Foreman Jaramillo testified that UFW organizers came onto the bus to talk to workers on two occasions a week prior to the work stoppage. Jaramillo stated that he believed that the organizers and workers talked about having an election.

Although Blomquist testified that it was Alpine's policy to "stay with the standards of industry," he said that he did not know specifically how many times his competitors raised their wages in 1979. Furthermore, Alpine traditionally raised its wages once a year on July 1. Departing from custom, Alpine raised wage rates twice in 1979, in March and August.

It is illegal for an employer to grant a benefit with the intent of interfering with the exercise of employee Section 1152 rights. NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). Kawano, Inc., 3 ALRB No. 54 (1977) If it is in direct response to employee organizing activity, it is a violation of Section 1153(a), if intended to dissuade employees. Prohoroff Poultry Farms, 3 ALRB No. 87 (1977). A strong presumption of such intent is raised if benefit is granted or promised in the midst of organizing activity or an election campaign. NLRB v. Exchange Parts, supra. A "prima facie" violation is established in such circumstances, placing a heavy burden on the employer to justify his action. NLRB v. Styletek, 520 F.2d 275 (1975). See also Hawthorne Aviation, 161 NLRB 1326 (1960); NLRB v. Ralph Printing & Lithographing Co., 379 F.2d 687 (1967); NLRB v. Lester Bros., Inc., 301 F.2d 62 (1962).

However, where explicit intent to interfere with employee rights is not shown, a grant or promise of a benefit in such circumstances may be justified if it is in accordance with plant custom or business necessity. J.P. Stevens Co. v. NLRB, 461 F.2d 490 (1972); B.D. Laboratories, Inc. Falcon Plastics Div., 164 NLRB 786. Lack of knowledge of union activity may be a factor, Eagle Engineering Corp., 168 NLRB 852 (1967), or if it was done in accordance with past practice. Doubleday Bros., 163 NLRB 1053 (1967). See also Karahadion Ranches, Inc., 5 ALRB No. 37 (1979).

The timing itself may be sufficient to draw the inference of an illegal motive. J.P. Stevens v. NLRB, supra. It has been held illegal to grant a benefit during an election campaign even though it was planned prior to it. Hineline's Meat Plant, Inc. 193 NLRB 867 (1971). Moreover, if there is other evidence of anti-union animus, the suspect character of timing of the benefit may be increased. Tex-Cal Land Management, 3 ALRB No. 14 (1977); Anderson Farms Co., 3 ALRB No. 67 (1977). In Akitomo Nursery, 3 ALRB No. 73 (1977), a wage increase granted in an organizational campaign was judged a violation even where there was a general increase in wages in the area. Other Section 1153(a) violations in conjunction with the timing were determinative.

From these facts, I must infer that Alpine announced the August 31 wage increase to interfere with the employees' organizational rights. Foremen Gomez and Jaramillo had knowledge of union activity during the week preceeding the announced wage increase. Rick Rubbo testified that he was aware of union activity in the

area, denying knowledge of specific activity at Alpine. Furthermore, Rubbo often followed the buses picking up workers. Jaramillo testified that his bus was boarded by union organizers on two occasions. The only conclusion I can draw from these events is that the employer knew that the UFW was organizing its employees. To counteract that campaign, Larry Blomquist decided to announce a wage increase on August 31 to dissuade his workers from joining the union. Unlike other years, Alpine granted two wage increases in 1979, breaking with tradition. Furthermore, the increases were not justified because of increases given by competitors that year. I find that such an unjustified grant of benefit during an organizational campaign violated Section 1153(a) of the Act.

II. The August 31 Work Stoppage; Discharge of the Cauliflower Crew on September 11; Discharge of the Broccoli Crew on September 13

On the morning of August 31, the cauliflower and broccoli crews walked out of the fields. Cauliflower cutter Mondragon testified that his crew stopped for a 48-hour period to demonstrate they wanted better work hours.

Employee Morales testified that he informed foreman Jaramillo that the crew was stopping for 48 hours. He then testified telling supervisor Rubbo that the crew would return on Tuesday, September 4, because September 3 was a holiday.

All company supervisory personnel consistently denied knowledge of the 48-hour work stoppage. Larry Blomquist stated that the status of the workers who walked off on August 31 was "presumed

quit." Mark Crossgrove testified that he presumed that the crew had quit on August 31, when the members walked off.

When the crew members attempted to return to work on September 4, the company bus did not pick them up. Employees Morales, Rodriguez, Mendoza, and Balcazar all testified that the company bus failed to pick them up on September 4 and 5. Furthermore, according to Mendoza, foreman Gomez informed him on September 3 that all those who walked out had been fired.

In addition, Morales testified that Rubbo told him that "if you stop, you won't have a job any more." Morales also stated that Rubbo told the workers on September 4 that another company bus would come for the waiting workers. Rubbo denied making both these statements to Morales. I credit the employees' version of the events surrounding the walkout and their attempted return.[8/] Although the company rehired the workers later that week, the company punished them by not picking them up on September 4.

The discharge of employees for engaging in concerted activity is an unfair labor practice. A main purpose of the Act is to assure that "the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining." NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939). Strikers remain employees for the remedial purposes of the Act, and are protected under it from discharge. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 347 (1937). This

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8/ The workers' stories were basically consistent. I had difficulty believing the persistent testimony of supervisory personnel, denying all knowledge of the 48-hour work stoppage. For that reason, I disbelieved much of their testimony, crediting employee accounts of the events.

The main discrepancy in employee testimony concerned the date of return. Based on the entire record, I find that the employees returned to work on September 5, one day after they intended to return from the work stoppage.

broad proscription has been consistently followed. See Tonkawa Refining Co., 452 F.2d 900 (1972); Owens & Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357 (1969); Hoover Design Corp. v. NLRB, 402 F.2d 987 (1968); Astro Electronics, Inc., 188 NLRB 572 (1971); Intalco Aluminum Corp., 182 NLRB 413 (1970).

The U.S. Supreme Court in Mackay provided the employer with the option of permanently replacing strikers. However, the employee retains rights to reinstatement if no permanent replacement has been hired, as well as priority to future openings. Mackay, supra; NLRB v. International Van Lines, 409 U.S. 481 (1972); NLRB v. Great Dane Fleetwood Trailer Co., 359 U.S. 375 (1958).

Although the ALRA does not contain the same qualifying clause as does the NLRA, which states in Section 2(3) that "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute," it was held in Kyutoka Nursery, Inc. 3 ALRB No. 30 (1977), and affirmed in Santa Clara Farms, Inc., 5 ALRB No. 67 (1979), that the striker is meant to be considered an employee under the ALRA, as he is under the NLRA.

Thus, it has been consistently held that agricultural employees are protected from discharge for engaging in concerted strike activity, Pappas & Co., 5 ALRB No. 52 (1979) or any protected concerted activity. S.F. Growers, 4 ALRB No. 58 (1978).

Although the employer has the right under Mackay to replace strikers with permanent replacements, such a replacement would be illegal if its motive was actually discriminatory. "When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally

incidental to the conduct of a business may, without more, be converted into an unfair labor practice." Erie Resistor, 373 U.S. 221, 227 (1962). Of course, such explicitly discriminatory purpose is not usual, and there seems to be little room to challenge the actual replacement of a striker. However, where the company claims that the worker has quit, it gives rise to the presumption that the purpose was not to replace but to discharge, and as noted in the cases above, this is plainly illegal when in fact the employees have not quit, but are engaging in concerted activity.

An employer cannot lay down an ultimatum to strikers that if they do not return to work they will be considered to have "quit." NLRB v. Comfort, Inc., 365 F.2d 867 (1966). The owner cannot lead workers engaged in concerted activity to believe they have been been discharged, and then treat them as having quit. NLRB v. Hilton Mobile Homes, 387 F.2d 7 (1967). See Elam v. NLRB, 395 F.2d 611 (1968); P.R. Mallory & Co. v. NLRB, 400 F.2d 956 (1968).

From the above discussion, it is clear that the employees were involved in concerted strike activity when they struck for 48 hours. The company's treatment of that activity as a "presumed quit" does not cure its discriminatory nature. Furthermore, the credited testimony reveals that the employees were threatened with discharge if they attempted such a work stoppage. Although Crossgrove testified that a new cauliflower crew was hired by Ruben Gomez following the August 31 walk out, the company failed to establish that any new workers actually were hired to replace the striking workers. There were positions open for all striking

workers who returned to work during that following week.

I find the company's conduct in not rehiring the workers immediately after the 48-hour walk out to violate Sections 1153(a) and (c) of the Act.

However, the returning workers did not remain with the company long after that August 31 work stoppage. On September 11, the entire cauliflower crew was discharged because they performed poorly that day. Crossgrove testified that the crew had done a fine job on the first two fields it worked that day. On the third field, however, Crossgrove stated that they were going too slowly and were destroying good heads of cauliflower by chopping through their centers. He also claimed that a woman in the crew said that they were not going to do a better job.

Tractor driver Balcazar testified that the condition of the last cauliflower field worked on September 11 was very bad. He further testified that he was instructed to drive faster than usual while workers complained about the speed. Balcazar also stated that the third tractor working with the people who had not engaged in the work stoppage was going slower. Crossgrove also testified that he had instructed Balcazar to drive faster. Balcazar further testified that Ruben Gomez told him in a telephone conversation on the following day that the company did not want any of the old workers there any more.

Different considerations arise when an employee is discharged for what would be a valid reason if it were the sole reason. When this is the case, the focal point of inquiry is whether the employer is motivated by a proscribed purpose, especially the Section 8(a)(3) (Section 1153(c)) proscriptions against discrimination for union activity. It is well established that mere

knowledge by an employer of the discharged employee's activities will not in itself insulate the employee from reasonable discharge. NLRB v. Swan Super Cleaners, Inc., 384 F.2d 609 (1967). See NLRB v. AAA Elec., Inc., 472 F.2d 444 (1973). However, the existence of a valid motive will not free the discharge from proscription if it is not the "sole reason", Self Reliant Ukranian American Co-operative Association v. NLRB, 461 F.2d 33 (1972); Bacchus Farms, 4 ALRB No. 26 (1978); or if the discriminatory purpose was a "partial factor", NLRB v. Princeton Inn Co., 424 F.2d 264 (1970); or was the "moving cause." NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (1970), Hemet Wholesale, 3 ALRB No. 47 (1977). This has been viewed as a "but-for" rule. "Even where the anti-union motive is not the dominant motive," but is the "last straw," which leads to discharge, it is still proscribed. NLRB v. Whitfield Pickle, 374 F.2d 576 (1967).

Of course, while direct evidence of such a motive would be sufficient, most cases require that the discriminatory motive be inferred from circumstantial evidence. Amalgamated Clothing Workers v. NLRB, 302 F.2d 186 (1962). See also, Melrosa Processing Co., 351 F.2d 593 (1965); Abatti Farms, Inc. 5 ALRB No. 34 (1979). The record as a whole is used to determine the possible motive. McGraw-Edison Co. v. NLRB, 419 F.2d 67 (1969); Sinclair Glass, 465 F.2d 209 (1972); As-H-Ne Farms, 3 ALRB No. 43 (1977). The totality of the evidence and circumstances are to be considered. Genuardi, 172 NLRB 1357 (1968).

A variety of factors will be weighed in this analysis, with certain basic themes recurring. The timing of a discharge, and its coincidence with protected activity on the part of the employee

is a critical factor. NLRB V. Council Manufacturing Corp., 334 F.2d 161 (1964); McGraw-Edison Co. v. NLRB, supra. If the discharge occurs in the heart of an organizational campaign, it is inherently suspect and renders the employer vulnerable to an inference of illicit motive. NLRB v. Des Moines Foods, Inc., 296 F.2d 285 (1961). The abruptness of a discharge and its timing are persuasive evidence. NLRB v. Montgomery Ward & Co., 242 F.2d 497 (1957). In Foster, L.B. Co., 193 NLRB 401 (1971), a whole unit was fired with dissatisfaction claimed as the cause by the employer, arising at the same time as the union did. A sudden dismissal without previous notice of dissatisfaction is suspect. Central Distributing Co., Inc., 187 NLRB 908 (1971). The fact that Section 8(a)(1) violations were committed by the employer around the same time as the discharge is relevant to finding a discriminatory motive, Aliceville Cotton Mill, Inc., 193 NLRB 865 (1971), and indicates anti-union animus. Ferenbach, Leon Inc., 213 NLRB 63 (1974). (See discussion of the Access Violation.) If a disproportionate percentage of those discharged are union activists, it gives rise to an inference of discrimination. Montgomery Ward & Co. v. NLRB, 377 F.2d 452 (1967). See Abatti Farms, Inc., 5 ALRB No. 34 (1979); Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977); Hemet Wholesale, 3 ALRB No. 47 (1977).

Although Crossgrove testified that the crew performed unsatisfactorily on the third field, other factors must be considered in determining whether the company's action in firing these employees was at all discriminatorily motivated. The workers who had engaged in the work stoppage were assigned to the two tractors that supervisor Crossgrove ordered to go faster.

At the same time, workers were asking tractor driver Balcazar to go slower. Furthermore, foreman Gomez told Balcazar the next day that the company did not want any of the old workers there any more. In evaluating the discharges, it must be noted that their timing shortly followed the work stoppage by employees supporting the UFW and preceded the firing of the broccoli crew by only two days. Thus the discharges occurred during an organizational campaign, making the employer vulnerable to an inference of illicit motive. I therefore find that the September 11 discharge of the cauliflower crew, a crew that heavily supported the UFW, violated Sections 1153 (a) and (c) of the Act.

On September 13, two days after the discharge of the cauliflower crew, Blomquist met with the workers of broccoli crew #1. Blomquist and the workers discussed working hours and wages. According to employee Morales, Blomquist agreed to worker requests that the crew not be required to work overtime (more than eight hours and four hours on Saturday). However, Blomquist did not agree to pay time and a half for overtime work.

According to Rick Rubbo, he instructed Mike Silva to write up the crew on September 13 because they refused to cut a third field, after agreeing to do so. The crew apparently had completed working eight hours when Rubbo set up the machinery in the wet field. Silva testified that he made out personnel action forms for all the broccoli crew on September 13. He further testified that he wrote out slips firing employees who had more than three warnings. The crew members received their termination notices when they picked up their checks at the office on Saturday, September 15.

Rick Rubbo testified that the company had a policy of automatically firing an employee after receiving three warnings. He later testified that the company would evaluate the seriousness of the warnings before firing a worker. Mike Silva also testified that the policy of firing a worker after receiving three warnings invariably is followed. On the other hand, Mark Crossgrove testified that he would exercise his discretion in deciding whether or not to fire an employee. He stated that it was not automatic that a worker would be fired after the third warning. He said that he would consider the gravity of the offense in deciding whether to fire an employee.

In a number of cases workers refused in concert to work overtime, although work rules required them to do so. First National Bank of Omaha, 413 F.2d 921 (1969); Schultz, Snyder & Steel Lumber Co., 198 NLRB 431 (1972); McGaw Laboratories, 206 NLRB 602 (1973). Workers assume the status of strikers when they engage in such a concerted work stoppage. National Bank of Omaha, supra. The intent of the workers to return the next day does not make such a work stoppage a "partial strike" and thus unprotected. NLRB v. Leprino Cheese Co., 424 F.2d 184 (1970). In NLRB v. Washington Aluminum, 370 U.S. 9 (1961), it was held that the spontaneous work stoppage by employees protesting the cold conditions in the plant was concerted activity, and could not lose its protected character simply by a plant rule prohibiting such stoppages. See Electronic Design & Development v. NLRB, 409 F.2d 631 (1969); Elam v. NLRB, 395 F.2d 611 (1968).

Because unorganized workers lack a structure in the union to protect their interests, there exists a "presumption that a

single concerted refusal to work overtime is a protected strike activity--and that such presumption should be deemed rebutted when and only when the evidence demonstrates that a stoppage is part of a plan or pattern of intermittent action." Polytech Inc., 195 NLRB 695 (1972). In such a situation, the employer is precluded from the good faith defense that he thought the employees had engaged in unprotected activities. NLRB v. Western Meat Packers, Inc., 368 F.2d 65 (1966).

In Pappas & Co., 5 ALRB No. 52 (1979), the workers evinced a variety of motives when they refused to work overtime, but this was considered irrelevant. "We should not have reached a different result in either event." Id. at p. 2. Whatever the motives of the individuals, such a refusal was a concerted activity within Section 1152 of the Act. The employer attempted to treat the workers as having quit by paying them off as they left, but this was not allowed.

Thus it is soundly established that a single concerted refusal to work overtime is protected. Notwithstanding the state of the employer's mind or his motivation, he cannot discharge workers who engage in such a work stoppage.

The firing of the entire broccoli crew #1 occurred during the UFW's organizational campaign, two days after the entire cauliflower crew was discharged. Furthermore, according to company personnel, the terminations were affected because these employees had accumulated three written warnings. One of the write-ups involved the employees' concerted activity on August 31. The company already had decided to rid itself of the UFW-dominated cauliflower crew. Foreman Gomez had expressed the

company's displeasure with the old workers who had engaged in the work stoppage. By eliminating the broccoli crew, the company eliminated another crew that actively supported the UFW. Furthermore, the crew's refusal to perform overtime work on September 13 was protected strike activity even though they intended to return to work the following day. I therefore find that the discharge of the broccoli crew on September 13 violated Sections 1153(a) and (c) of the Act.

III. Denial of Rain Gear

After the work stoppage on August 31, the broccoli crew was instructed by Rick Rubbo to leave the rain gear belonging to the company on the bus. When the striking crew returned to work the following week, some of the rain gear had been removed by other workers. Rubbo sent Mike Silva to the Acme Sales Company at 8:00 a.m. on September 5 to get more equipment. Based on an invoice and testimony of Acme's general manager, Rick White, Alpine purchased 10 pairs of rain pants and 13 pairs of boots. According to Ricardo Morales, Silva brought partial equipment on September 6. Morales complained that four workers remained without equipment that day. He further testified that he did not get his full complement until September 10. Saul Rodriguez stated that he waited until September 7.

The company's actions surrounding the replacement of equipment does not reveal a discriminatory pattern. The company moved to purchase more equipment the first morning the strikers returned. According to the credited testimony of Rubbo, there

was enough gear to go around that first morning. Silva testified that he did not hear any complaints following the distribution of the new rain gear. I find that if some of the workers did not receive rain gear during that distribution on September 5, that fact was not made known to either Silva or Rubbo. Wanting the employees immediately to return to work, the company supervisors acted swiftly to replace the missing equipment. I therefore find no violation of Section 1153(a) of the Act.

IV. Denial of Access on September 1

Section 20900 of the Board's Regulations reads, in pertinent part:

> (3)(B) . . . organizers may enter the employer's property for a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall encompass such lunch break. If there is no established lunch break, the one-hour period shall encompass the time when employees are actually taking their lunch break, whenever that occurs during the day.
>
> (4)(A) Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.
>
> (4)(B) Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge which clearly states his or her name, and the name of the organization which the organizer represents.
>
> (4)(C) The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding busses. Speech by

itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.

There is little dispute surrounding the events of the morning of September 1 at the Mission Ranch. The striking workers assembled 20-25 pickets at that ranch, attempting to get lettuce workers to join their work stoppage and sign union authorization cards. The picketing group was led by Raul Valle, Ricardo Morales and Saul Rodriguez. Hortencia Rojas, a SunHarvest worker, served as an interpreter for the striking employees. Her credited testimony revealed that she spoke to Gary McKinsey, seeking permission. Without asking for identification, he flatly refused to allow the organizers an opportunity to talk to the lettuce workers.

Larry Blomquist basically corroborated this version of the event. He stated that when the pickets asked to take access, he thought that all the assembled pickets were asking permission to go into the field. However, he never clarified that perception with any of the pickets. He merely refused to allow anyone to take access. There was no testimony from company personnel that the individuals attempting access were not properly identified.

While Gary McKinsey contended that the lettuce workers were not taking a break that Saturday, I credit Ricardo Morales, who stated that the workers broke for lunch that day.

Section 20900(4)(B)1 of the Regulations places a duty upon the organizer to wear identification and to identify himself upon request when he seeks access. However, he has no affirmative

duty to identify himself unless he is requested to do so. Denial of access by an employer who claims he was unable to distinguish a certified organizer from those without access rights is a violation of Section 1153(a) where the employer failed to request identification. Belridge Farms, 4 ALRB No. 30 (1978).

Furthermore, Section 20900(3)(B) grants a right of access during lunch breaks, and abridging this is a clear violation. D'Arrigo Bros., Reedly Dist. #31, 3 ALRB No. 31 (1977); Jackson & Perkins Co., 3 ALRB No. 26 (1977); Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977).

Good faith ignorance of the law is no defense to a Section 1153(a) violation. Jackson & Perkins, supra. See NLRB v. Burnup and Sims, Inc., 379 U.S. 21 (1964).

Although Section 20900(4)(A) limits the number of organizers, an employer cannot deny access to all properly documented organizers because "too many" others were there. It is up to the employer to ask for identification, and when the proper limit of organizers has been granted access then he can deny additional access. Belridge Farms, 4 ALRB No. 30 (1978).

Clearly, the Respondent has not provided an adequate defense for the denial of access on September 1. Furthermore, after viewing the videotape (Resp. Exh. 18) offered by Respondent to show the unruly nature of the picketing on September 1, I am unable to find that the conduct appears disruptive of Respondent's operations. I therefore find that Respondent violated Section 1153(a) of the Act by denying access to organizers on September 1.

V. Surveillance by Respondent

The facts are not in dispute. Larry Blomquist testified that his brother Dan used a moving picture camera because people were rushing the fields with sticks and other things. Larry Blomquist stated that the camera was used on September 1 to document acts of violence by the strikers. As previously mentioned, I viewed the videotape (Resp. Exh. 18) and was unable to discern any disruptive or violent acts.

Surveillance of employee concerted activity or union activity is a Section 8(a)(1) violation under the NLRA, even if it is an isolated incident. NLRB v. Clark Bros., 70 NLRB 802 (1946), enf'd 163 F.2d 373 (1947). It is the coercive tendency of the employer's conduct, as in all Section 8(a)(1) violations, rather than his motive or the actual effects that is the object of prohibition. NLRB v. Standard Container Co., 428 F.2d 793 (1970); NLRB v. Illinois Tool Works, 153 F.2d 811 (1946); NLRB v. Intertherm, Inc., 596 F.2d 267 (1979); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

This standard has been upheld in Merzoian Bros., 3 ALRB No. 62 (1977), where proof of coercive effect was unnecessary, it being enough to show a reasonable tendency to interfere with Section 1152 rights. The test is whether conduct reasonably tends to interfere with Section 1152 rights. Nagata Bros., 5 ALRB No. 39 (1979).

Any surveillance violates the Act, whether overt or concealed, NLRB v. Collins & Aikman Corp., 146 F.2d 454 (1949), or whether the employer only takes steps that lead employees to think that surveillance is going on. Hendrix Mfg. Co. v. NLRB,

321 F.2d 100 (1963). A violation is found where the willful conduct of the employer in observing employee activity creates a justifiable impression of coercion, NLRB v. International Typographical Union, 452 F.2d 976 (1972).

Photos and movies of concerted activity are inherently objectionable. NLRB v. Associated Naval Architecture, Inc. 355 F.2d 788 (1966).

Photographic surveillance of a union organizer in O.P. Murphy Produce Co., Inc., 4 ALRB No. 106 (1978), and the use of camera and tape recorder in observing organizing activity in Belridge, 4 ALRB No. 30 (1978), were held clear Section 1153(a) violations, having a chilling effect upon employees' Section 1152 rights.

Although an employer can present legitimate business reasons for his activity, which will be balanced against that activity's tendency to inhibit the exercise of Section 7 rights, Struknes Const. Co., 165 NLRB 1062 (1967), or Section 1152 rights, the inherently coercive nature of photographic surveillance places a heavy burden upon the employer. Thus, where the employer seeks to justify his photographing of pickets by his plans for an injunctive suit against employee violence, if no photos are introduced into injunctive proceedings it may be inferred that he has violated Section 8(a)(1). Larand Leisurelies, Inc. v. NLRB, 523 F.2d 814 (1975). See also NLRB v. Colonial Haven Nursing Home, Inc., 542 F.2d 691 (1976).

Respondent's defense for the photographing falls far short of establishing a legitimate purpose for the use of the camera. Having viewed the videotape, I find nothing in the film that

would lead to the conclusion that the pickets were violent or disruptive of Respondent's operations on September 1. I therefore find that the use of a videotape camera that day violated Section 1153(a) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Sections 1153(c) and 1153(a) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully terminated the employment of the cauliflower crew on September 11 and broccoli crew #1 on September 13, I shall recommend that Respondent be ordered to make those employees whole for any loss of earnings and other economic losses suffered as the result of the discharges, together with interest.

In order to more fully remedy Respondent's unlawful conduct, I shall recommend that Respondent make known to all its current employees and to all employees on its payroll on September 1, 1979, that it has been found in violation of the Agricultural Labor Relations Act, that it has been ordered to make the cauliflower crew and broccoli crew #1 employees whole for any loss of earnings and other economic benefits resulting from its unlawful act, and that it has been ordered to cease violating the Act and not to engage in future violations.

To this end I shall recommend:

1. That Respondent be ordered to sign the attached Notice and post copies of it at times and places to be determined by the Regional Director. The Notices shall remain posted for a period of 60 days. Copies of the Notice after translation by the Regional Director into appropriate languages shall be furnished Respondent in sufficient numbers for the purposes described herein.

2. That Respondent be ordered to distribute a copy of the Notice to each of its current employees.

3. That Respondent be ordered to mail copies of the attached Notice, in all appropriate languages, within 31 days of receipt of the Board's order, to all employees on its payroll as of September 1, 1979.

Upon the basis of the entire record, the findings of fact, the conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, its officers, agents, supervisors and representatives shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against agricultural employees because of their union membership, union activities, or association with union agents.

(b) Exercising surveillance of employees' union activities.

(c) Denying access to authorized union representatives.

(d) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of their rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

2. Take the following affirmative actions, which are deemed necessary to effectuate the policies of the Act:

(a) Offer members of the cauliflower crew (Luz Maria Alcantar, Bulmaro Alcalas, Juvenal Ayala, Trinidad Ayala, Porfirio Balcazar, Francisca Castro, Claudia Gallardo, Alicia Guevara, Juan Juarez, Adriana Leal, Heriberto Mendoza, Joel E. Mendoza, Jose Mondragon, Jessie Zepeda) and broccoli crew #1 (Miguel Bedoya, Jose Buendia, Rene Coronel, Mario Luna, Lusio Mendes, Ricardo Morales, Robert Moreno, Efrain Munos, Sergio Munos, Jorge Partida, Pedro del Rio, Saul Rodriguez, Manuel Soto, Marcos Jaquis) full reinstatement to their former positions or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Reimburse said members of the cauliflower crew and broccoli crew #1 for all wage losses and other economic losses they have suffered as a result of their discharge. Loss of pay is to be determined by multiplying the number of days the employee was out of work by the amount the employee would have earned per day. If on any day the employee was employed elsewhere, the net earnings of that day shall be subtracted from the amount the employee would have earned at Alpine Produce for that day only. The award shall reflect any wage increase, increase in work hours, or bonus given by Respondent since the discharge. Interest shall be computed at the rate of 7 percent per annum.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the provisions of this Order.

(d) Sign the Notice to Employees attached hereto. After its translation by a Board agent into Spanish and any other appropriate language(s), Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice at conspicuous places on its premises, the places of posting to be determined by the Regional Director. The Notices shall remain posted for 60 consecutive days at each location. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Mail copies of the attached Notice in Spanish and any other appropriate language(s) within 30 days after the date of issuance of this Order, to all employees employed at any time during the last payroll period in August, 1979, and the first payroll period in September, 1979.

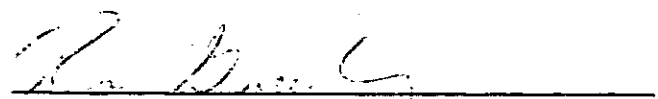
(g) Arrange for a representative of Respondent or a Board agent to read the attached Notice in Spanish and any other appropriate language(s) to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the

opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice of their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: December 1, 1980

Agricultural Labor Relations Board

By 

Ron Greenberg
Administrative Law Officer

NOTICE TO EMPLOYEES

After a trial in which each side had an opportunity to present its facts, the Agricultural Labor Relations Board has found that we violated the law by discharging employees because of their union activities.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law of the State of California which gives farm workers these rights:

1. To organize themselves.

2. To form, join, or help unions.

3. To choose, by secret ballot election, a union to represent them in bargaining with their employer.

4. To act together with other workers to try to get a contract or to help and protect one another.

5. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or prevents you from doing, any of the things listed above.

Especially:

WE WILL NOT discharge, lay off, or otherwise discriminate against any employee because of his or her union activity, union sympathies, or association with union agents.

WE WILL NOT closely watch any of your union activities.

WE WILL NOT deny access to union organizers.

The Agricultural Labor Relations Board has found that we discriminated against the cauliflower crew (Luz Maria Alcantar, Bulmaro Alcalas, Juvenal Ayala, Trinidad Ayala, Porfirio Balcazar, Francisca Castro, Claudia Gallardo, Alicia Guevara, Juan Juarez, Adriana Leal, Heriberto Mendoza, Joel E. Mendoza, Jose Mondragon, Jessie Zepeda) and broccoli crew #1 (Miguel Bedoya, Jose Buendia, Rene Coronel, Mario Luna, Lusio Mendes, Ricardo Morales, Roberto Moreno, Efrain Munos, Sergio Munos, Jorge Partida, Pedro del Rio, Saul Rodriguez, Manuel Soto, Marcos Jaquis) by discharging them because of their union activities. We will reinstate them to their former jobs and reimburse them for any loss of pay and other economic losses, plus 7% interest per annum, they suffered as a result of their discharge.

Dated: ALPINE PRODUCE

By: _____
(Representative) (Title)

This is an official document of the Agricultural Labor Relations Board, an agency of the State of California

DO NOT REMOVE OR MUTILATE.